

LHS

STATE OF UTAH
OFFICE OF THE ATTORNEY GENERAL



JAN GRAHAM
ATTORNEY GENERAL

CAROL CLAWSON
Solicitor General

REED RICHARDS
Chief Deputy Attorney General

PALMER DEPAULIS
Chief of Staff

January 13, 1998

Gayle F. McKeachnie
MCKEACHNIE & ALLRED
121 West Main Street
VERNAL UT 84078

Re: Petition to Appoint River Commissioners

Dear Gayle:

This is in response to your letter of December 11, 1997 and your proposed draft Petition to Appoint Water Commissioners for the Lake Fork and Uinta Rivers via the general water adjudication process.

As you are well aware, the various rather complex problems on the Uinta and Lake Fork Rivers are further complicated by a number of practical and jurisdictional sensibilities. Among these problems are: (a) that the non-Indian water users seem to be in disagreement over who can take water in what amounts and at what times; (b) the fact that the State Engineer has been unable to adequately resolve these problems in the past to the satisfaction of the competing non-Indian users; (c) the fact that the State Engineer has not as yet issued Proposed Determinations on either the Lake Fork or Uinta Rivers; and (d) the Ute Tribe may be reluctant to submit to the State Engineer's jurisdiction--although that is clearly provided for in both drafts of the Ute Indian Water Compact (1980 draft and 1989 draft).

Given all of this, it is the State Engineer's general position that we would prefer the matter be resolved through the State system, and it looks like petitioning the Court is the best avenue for doing so. However, since the United States and the Tribe are not as yet parties to the general adjudication action, they will have to be agreeable to the process you and I have heretofore discussed.

Letter to Gayle F. McKeachnie
January 13, 1998
PAGE TWO

Further, it must be remembered that the State Engineer generally has no power or authority to adjudicate water rights--except through making recommendations to the Court in the general adjudication process. We fully understand that your clients are anxious to solve any disputes or disagreements in the least costly and time-consuming manner possible. Nevertheless, I see no way to do this other than through the Court process. One exception might be to use § 73-2-16, which authorizes the State Engineer to arbitrate disputes over water or the distribution thereof through some sort of binding arbitration. While this statute would seem to be geared towards a permanent resolution of water disputes, perhaps it could be used to settle any disputes on an interim basis until the Court has an opportunity to address them in the general adjudication process. In other words, § 73-2-16 could be used to resolve disputes on an interim basis if all parties were willing to submit to binding arbitration before the State Engineer--without waiving any of their rights to finally adjudicate the matter as part of the general adjudication process. Given the past experiences in these drainages, the State Engineer is simply not willing to become embroiled in a lawsuit over any water adjudication or distribution matters outside of the general adjudication process. The use of the above statute may be a way to solve the disputes on an interim basis without costly and time-consuming litigation. You may want to give this some thought and discuss it with your folks.

Next, with regard to the prior federal decree(s) in these drainages, I have not as yet had an opportunity to studies those in any great detail. However, regarding the general adjudication process, § 73-4-11 provides that during the pendency of an adjudication proceeding water shall be distributed according to prior decrees until they are reversed, modified, or vacated in the general adjudication process. Thus, with regard to the federal decrees in the area, it seems to me that water should be distributed under the provisions of those decrees until they are otherwise modified in the general adjudication proceedings. I don't know exactly the extent to which those decrees govern Indian and non-Indian uses in these drainages--but to the extent they do, the water should be distributed on an interim basis pursuant to those decrees. Bob Leake also tells me that currently the District Court has ordered the State Engineer to appoint a River Commissioner on Deep Creek (which is tributary to the Uinta River). Thus, Deep Creek should be deleted from your Petition (see page 2 of the Petition).

Turning to your proposed Petition, we have the following comments:

Letter to Gayle F. McKeachnie
January 13, 1998
PAGE THREE

1. On the first page of the Petition, you cite as authority § 73-5-1. That statute gives the State Engineer general authority in the distribution of waters throughout the State and is not specifically tied to the general adjudication process. Thus, we would suggest that you also cite as authority § 73-4-11--which governs interim distribution during the pendency of a general adjudication action--to tie your petition squarely to the general adjudication process.

2. At the bottom of page two of the Petition, you recite the fact that from time to time disputes arise among the water users as to the distribution and interpretation of various water rights. This concept is also brought up at the bottom of page three of your Petition. As will be discussed in more detail below, there seems to be some misunderstanding as to the role of river commissioners in the resolution of such disputes or interpretation of water rights. As we see it, a river commissioner will not be able to resolve those disputes. Only the Court can do that (or the State Engineer under the binding arbitration process discussed above). A Court can resolve these disputes either through the general adjudication process, through a private quiet title action, or in what we call a "mini-adjudication" pursuant to § 73-4-24.

3. We have some real problems with the Petition beginning at page six and going over to page seven. Your Petition seems to ask the Court to appoint commissioners--not just to distribute waters as ordered by the Court, but to act as "quasi-adjudicators" to resolve disputes that may arise between various water users. There is absolutely no authority for river commissioners to do this. Moreover, we don't believe there is any authority for the State Engineer himself to do this. As I discussed with you on the telephone, a river commissioner simply carries out the terms of a distribution order issued by either the State Engineer or the Court, and cannot resolve any disputes regarding the distribution order or the underlying water rights.

Thus, we believe that these portions of your Petition need to be substantially reworked. Otherwise, we may have to object to the process as you have proposed in your Petition as, again, we see no statutory authority or basis for having the river commissioners act as adjudicators as proposed in your Petition. If we have somehow misunderstood or misinterpreted your intent in this regard, please let us know.

4. As we read your Petition, you basically propose a dual delivery schedule with the federal decrees governing the rights affected by those decrees and the other rights governed by your proposed "Schedule A". I am having Bob Leake look at your proposed "Schedule A" to make sure that it covers all non-decreed rights in

Letter to Gayle F. McKeachnie
January 13, 1998
PAGE FOUR

those drainages. Any such schedule should include all certificated rights. Moreover, we would suggest putting all of the rights--decreed or otherwise--into one distribution schedule, noting those rights which are decreed and those which are not.

In conclusion, it seems to us that given current developments there may be numerous disputes among the various water users regarding their relative rights in these drainages. The only way these disputes can ultimately be resolved is through the general adjudication process. If all of the parties could agree among themselves to an interim distribution order, it would make it quite easy to get the Court to appoint a commissioner and take the matter from there. If there cannot be an agreement, the parties will have to look to whatever is the best method for resolving those disputes on an interim basis--but as pointed out above, that cannot be done through river commissioners. The process, as we see it, has worked fairly well on the Strawberry/Duchesne System, but it has basically worked there over the years because the parties (other than a few disputes with which you are familiar) have been agreeable to the distribution order as proposed by the State Engineer. But, even on the Strawberry/Duchesne System, the distribution order must be approved by the Court on an annual basis.

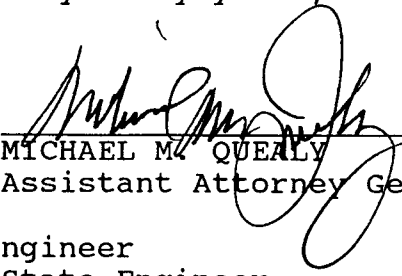
In short, unless the parties can either agree among themselves or submit to interim State Engineer arbitration of these disputes, I see no way around Court proceedings to resolve any such conflicts; and the appointment of river commissioners simply cannot and will not resolve those underlying disputes. We have no objection to the appointment of river commissioners through the Court. However, as discussed above, the role your Petition proposes for the river commissioners in resolving underlying water rights disputes is unacceptable to us at this time and I would suggest that you hold up filing it until we have a chance to discuss the matter further.

After you have had a chance to digest these comments and discuss them with your clients, it may be worthwhile to arrange a meeting to discuss this in more detail before you file something with the Court. In the meantime, if you have any questions, comments or other ideas--or if we have misinterpreted your intent as stated in the Petition--please don't hesitate to give me a call and we can discuss it.

Letter to Gayle McKeachnie
January 13, 1998
PAGE FIVE

Best personal regards.

Very truly yours,



MICHAEL M. QUEALLY
Assistant Attorney General

cc: Robert L. Morgan, State Engineer
cc: Kent L. Jones, Assistant State Engineer
cc: Lee H. Sim, Assistant State Engineer
cc: Robert W. Leake, Vernal Regional Engineer
UTAH DIVISION OF WATER RIGHTS
cc: John H. Mabey, Jr., Assistant Attorney General

MMQ/jr